

[DRAFT]

Postmodern theory's retreat amidst postmodern art's return: neglect of IP law as a possible cause of postmodernism's "death"

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Presented at the Faculty of Humanities and Social Sciences' Research Symposium, at Athabasca U, in Edmonton, on Sept. 23, 2015.

This talk outlines a research question about the relationship between postmodern theory and copyright studies. I started to think about this relationship when I first learned about the work of the famously anonymous artist Banksy, a moment that coincided with reading some claims that postmodernism had died with the twentieth century (Kunzru). Postmortems of postmodernism in journalism and scholarship alike have argued that the theory lost intellectual traction after 9-11 (Ahmed), or that its *avant* theory became everyday practice with the advent of the Internet (Kroker). Some related arguments have cloaked in theoretical language a surprisingly simplistic claim: that postmodernism "sold out" – a claim that betrays a grave misunderstanding of the subject in question.

It's interesting (and suspicious) that scholars and pundits have moved so quickly to pronounce postmodernism "dead." Postmodern theory provides mainly a periodizing concept, but it also represents an aesthetic and a critical ethos. Fredric Jameson distinguishes among *postmodernity* – the historical period of late or multinational capitalism – and *postmodernism* – an aesthetics of irony, intertextuality, and reflexivity, and a critical theory of doubt and difference, of "complicit critique" (Hutcheon) – as well as *postmodernization* – the cybernetic reorganization of labour under finance capital, for which Jameson finds alternate terms like "globalization" lacking (214-15).

While Jameson is the pre-eminent theorist of postmodernity as the condition of late multinational capital, the major theorist of postmodernism as an aesthetic is Linda Hutcheon, whose *Poetics of Postmodernism* (1988) and *Politics of Postmodernism* (2002) became widely taught texts in the field. And yet it is Hutcheon who has issued one of the most definitive pronouncements of the passing of the postmodern: in 2002, she surveyed a series of prior such pronouncements, going back to 1990, to say that postmodernism is both "over" (166) and that it "persist[s] as a 'space for debate'" (167). (This, by the way, is characteristically postmodern argument, preferring the ambiguity of "both/and" over the closure of "either/or.")

Some scholars share Hutcheon's sense of both an end and a continuation: Jameson reminds us that theorizing the contemporary after postmodernism is eminently postmodernist activity, and Josh Toth deconstructs postmodernism's "passing" as both death and bequest. However, many more scholars have moved, more unequivocally, to shovel dirt onto postmodernism's coffin, and, more hastily, to name what they think has superseded it. Hence a recent flurry of novel but awkward monikers for the contemporary cultural moment, like digimodernism (Kirby), cosmodernism (Moraru), and metamodernism, or "the New Sincerity" (Abramson). That last one makes me just gag.

Similar postmortems on other critical theories pop up from time to time. However, poststructuralism and postcolonialism (to name just a couple of particular targets for interdisciplinary sniping and anti-intellectual punditry) are still widely practiced, debated, and accepted as very much alive and kicking in scholarly circles. Why did postmodernism have to be so pointedly killed? Maybe there's a built-in expiry date for periodizing concepts - but the "postcolonial" has persisted in spite of the postmodern's precariousness. Alternately, the "sell-out" or co-optation arguments hold that postmodern discourse fell into scholarly disrepute as it rose to popular recognition, a process that was well underway by 1996 with the online "Postmodern Essay Generator" and arguably culminated with mention on the very postmodern TV show, *The Simpsons*, in November 2001. Maybe globalization replaced postmodernity as a conceptual framework for describing late multinational capitalism (Jameson). Now, I feel more affinity with scholars who continue to raise postmodernism than with those who come to bury it. But I do have a hunch about why postmodern theory may have lost purchase, and how it might regain it.

Despite the centrality of appropriation to postmodernist aesthetics, despite the embroilment of postmodernist artists in copyright actions, and despite the steady toughening of intellectual property (IP) law during the postmodern period, the majority of postmodern theory has largely neglected IP and copyright. I've identified three related patterns here. First, culture since the late 2000s and early 2010s has featured artists and practitioners who are producing what I would consider to be textbook postmodernist work for its intertextual borrowings and its transgressing of modernist distinctions between pop culture and capital-C Culture. I'm thinking here mainly of Banksy and Lady Gaga,¹ Kenneth Goldsmith, and TV shows like *Portlandia* and *30 Rock*. Second, the transformation of the "worldwide web" into the "read-write web" has fostered an explosion of do-it-yourself cultural production, so-called "user-generated content," in which postmodern aesthetics of irony, intertextuality, difference, and the sublime feature prominently; ditto the Brooklyn-based "hipster" scene of ironic authenticity that's led youth culture for almost a decade now. And third, the research literature shows a trans-disciplinary *asymmetry*: legal studies generally and intellectual property studies specifically are mostly absent from the main body of postmodern theory, but legal studies and even law practice have embraced postmodern theory.

The impact of postmodern theory on legal studies is noted in the 2002 second edition of Hutcheon's *Politics of Postmodernism* (170), in some edited collections on postmodern theory (Connor 1997, Lucy 2000), and in legal scholarship (Ladeur, Boyle). Postmodernism's impact on IP law in particular has been examined by law scholars like Peter Jaszi (2009) and Matt Williams (2011), who argue that postmodern theory has impacted IP law practice and jurisprudence in copyright and fair use, as demonstrated by a divergent pair of rulings on infringement actions brought against the artist Jeff Koons (who was an exemplar of postmodern style in the 1980s and '90s). In *Rogers v. Koons* 1992, the US Second Circuit Court of Appeals ruled that Koons' appropriation of Art Rogers' photograph was not fair use, but in *Blanch v. Koons* 2006, the *same* court ruled his appropriation of Blanch's photo *was* fair use. Jaszi reads this change in the same court's jurisprudence as evidence of the law's growing recognition of the cultural legitimacy of appropriating copyrighted works in new cultural production, which Jaszi recognizes as a hallmark of postmodernist aesthetics. But contrasting postmodern

theory's adoption in legal studies, postmodernism has long argued the legitimacy of appropriation, but without reference to IP law, about which it has had oddly little to say.

Several edited collections don't mention IP law (Docherty 1993, Natoli and Hutcheon 1993, Bertens and Fokkema 1997, Vaessens and van Dijk 2011); neither do landmark studies like François Lyotard's *The Postmodern Condition* (1984) and Jameson's *Postmodernism, or the Cultural Logic of Late Capitalism* (1991). In my reading so far, only Hutcheon's work addresses IP law, but only briefly: one reference to the deliberately copyright-violating "photographic pirating of Sherrie Levine and Richard Prince" (189). (Prince has continued to critique copyright in his art: in 2012, he printed a limited run of the first edition of J.D. Salinger's novel *The Catcher in the Rye* - with one editorial change: he replaced the author's name with his own. A bolder taunt to the most notoriously jealous and litigious estate in American literature can scarcely be imagined.)

More recent reflections on postmodern theory make similarly minimal mention of IP law (e.g. Gane and Gane 2007). But one standout treatment of IP law in postmodernity is offered by Mackenzie Wark (2007), who views the postmodern as the moment when information began to want to be free. He positions the postmodern as a critical phase, during which artists and intellectuals moved from the periphery of the commodity economy to its core, via the incorporation of their labour as intellectual property, an even more abstract property form than alienated labour (149-50). What points beyond any entrenched division between the "information economy's" classes – between intellectual workers ("the hacker class") and those who control distribution – is the promise of the abundance of information, despite its privatization through IP law into an artificially scarce resource. "The mission of the hacker class," Wark suggests, is to develop "practices by which information can be extracted from the commodity form and returned to the realm of the gift" (153).

These few critical considerations of IP in recent retrospectives on postmodern theory invite elaboration, in order to show postmodern theory's relevance and capacity for interpreting contemporary culture (and by the same token, to turn the problem of the postmodern's perceived obsolescence "into its own solution," as Jameson argues [2007: 216]; that is, to demonstrate that those theories of the contemporary which claim to have surpassed postmodernism are actually "yet another symptom of the postmodern process [they were] supposed to have supplanted" [216]).

A theory of the postmodern reoriented to IP law as a globalized regulatory infrastructure of contemporary cultural production, distribution, and consumption seems a useful analytic tool for interpreting both the DIY culture of everyday digital life and the more professional work of recent and current artists and intellectuals. Such theorization would emphasize postmodernism's focus on culture under capital, and would bring to postmodernism's standing concerns with intertextuality, appropriation, difference, the redistribution of authorship, and the interrogation of authority, a critical-legal concern with intellectual propertization as a staple institution of multinational capital, an infrastructure of cultural production, and a disciplinary technique to extend market-fundamentalist hegemony across the cut-copy-paste practices of everyday digital culture. That postmodern theory has mostly ignored IP issues suggests a cause of its supposed death; yet postmodernist cultural practices now flourish as never before and invite postmodernist analysis: from Banksy's sublime subversions of authorship and art, to Goldsmith's "uncreative writing," to the "art-rave" dance-pop of Lady Gaga, to the

distributed digital culture of memes and mashups. The retreat of postmodern theory – from IP issues and from scholarly currency - amidst this abundance of postmodern cultural practices poses both a quintessential postmodern irony, and some open questions I'll end with: how can postmodernist theory inform the critique of appropriation art and of IP law? How might critical IP studies reanimate and deepen postmodern theory? How does appropriation art itself theorize the postmodern?

Note

1. Lady Gaga's "Applause" addresses itself to the main concepts of postmodernism, albeit without naming postmodernism as such; "pop culture was in art / now art's in pop culture in me," she sings in the second verse. In this context I must also mention Gaga's recent modelling of a dress made of meat, which parodies—in perfectly postmodern fashion—Jana Sterbak's quintessentially postmodernist 1987 artwork, *Vanitas: Flesh Dress for an Albino Anorexic*, while also reanimating the earlier controversies over "the sexual politics of meat" (Mason) that had surrounded Sterbak's work.

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To cite this article (in MLA style):

McCutcheon, Mark A. "Postmodern theory's retreat amidst postmodern art's return: neglect of IP law as a possible cause of postmodernism's 'death'." Research Symposium, Faculty of Humanities and Social Sciences, Athabasca U, 23 Sept. 2015.



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1

**Post-9/11 reports of
postmodernism's death**

"Postmodern Outlook Objectively Smashed"
([Washington Post, 5 Nov. 2001](#))

"Attacks on U.S. Challenge Postmodern True
Believers"
([New York Times, 22 Sept. 2001](#))

"The Age of Irony Comes to an End"
([Time Magazine, 24 Sept. 2001](#))



2

...were maybe exaggerated

“American Life Turns Into Bad Jerry Bruckheimer Movie”

([*The Onion*, 26 Sept. 2001](#))



3

The postmodern: any or all of the following

Postmodernity: the historical period of late, multinational capitalism (Jameson)

Postmodernism: an aesthetics of irony, intertextuality, and reflexivity; a critical theory of doubt and difference, “complicit critique” (Hutcheon)

Postmodernization: finance capital’s cybernetic reorganization of labor and production (Jameson)



4

Post-postmodernisms?

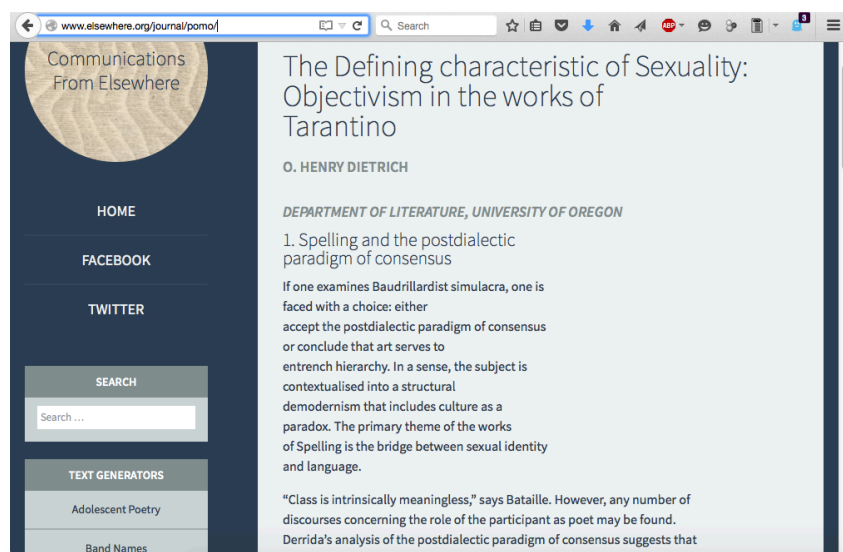
Digimodernism
(Alan Kirby 2009)

Cosmodernism
(Christian Moraru 2011)

Metamodernism, a.k.a. “the New Sincerity”
(Seth Abramson 2014)



5



[The Postmodern Essay Generator](#) (est. 1996)



6



“Homer the Moe,” *The Simpsons* 18 Nov. 2001



7

Postmodern theory and Intellectual Property (IP): art & culture today



< Banksy,
Dismaland
(2015)

Lady
Gaga,
meat dress
(2010) >



8

Postmodern theory and IP: user-generated content



Viral memes, e.g.
“Stephen Harper
crushing things”



A/V mashups, e.g.
YITT's “I really like
you” vs. “Head like a
hole”



9

Postmodern theory impact on IP law

Legal studies (and especially IP studies) are mostly
absent from postmodern theory

but

Legal studies and IP law practice have embraced
postmodern theory



10

Postmodern theory impact on IP law



Art Rogers - "Puppies"



Andrea Blanch - "Silk Sandals by Gucci"



Jeff Koons - "String of Puppies"



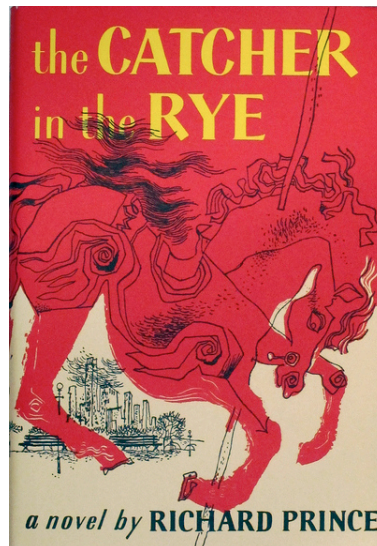
Jeff Koons - "Niagara"

Rogers v. Koons 1992:
not fair use

Blanch v. Koons
2006: fair use



11



The Catcher in the Rye
by Richard Prince (2012)



12

The ideology of “intellectual property” is nothing but the blurring of the line between producers of new information – the hacker class – and those who come, in the long run, to be its owners – the vectoralist class. ...

The mission of the hacker class might be to hack into existence practices by which information can be extracted from the commodity form and returned to the realm of the gift.

(McKenzie Wark, “Goodbye to all that” [2007])



13

I've overheard your theory
 “Nostalgia’s for geeks”
 I guess sir if you say so
 Some of us just like to read
 One second I’m a Koons
 The suddenly the Koons is me
 Pop culture was in art
 Now art’s in pop culture in me
 (Lady Gaga, “Applause” [2013])



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